

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

JOEL ROSS SEMPIER,

Petitioner,

v.

RENEE BAKER, et al.,

Respondents.

Case No.: 3:18-cv-00465-RCJ-WGC

**Order**

Joel Ross Sempier, a Nevada prisoner, filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. This Court denies Sempier's habeas petition, grants him a certificate of appealability, and directs the Clerk of the Court to enter judgment accordingly.

**I. BACKGROUND**

Sempier's convictions are the result of events that occurred in Washoe County, Nevada on August 26, 2011. ECF No. 25-7. The victim testified that Sempier was a cousin of her neighbors, James and Steve Cuevas. ECF No. 26-1 at 9, 17. The victim had met Sempier on approximately three occasions prior to August 25, 2011. *Id.* at 18. On that date, Sempier and his roommate, Richard Vigil, along with Steve Cuevas came over to the victim's house in the evening and were drinking beer with the victim and her husband. *Id.* at 37–38. Cuevas and Vigil left around 8:00

1 p.m., but Sempier stayed and continued drinking and hanging out. *Id.* at 39–40, 44. Sempier was  
2 invited to sleep at the victim and her husband’s house since the victim “didn’t feel that it was safe  
3 for anybody to be driving.” *Id.* at 45–46. The victim went to bed around midnight but was awoken  
4 between 3:00 a.m. and 3:15 a.m. “to feel a penis inside of [her] vagina.” *Id.* at 47, 53, 59. The  
5 victim “felt a wet liquid substance on the inner side of [her] thigh,” and then “hear[d] in [her]  
6 bathroom the toilet paper roll spin” and felt “tissue wiping the wet substance off of [her] leg.” *Id.*  
7 at 53. The victim initially believed that the sexual encounter was with her husband, but when she  
8 turned over, she “saw [Sempier] exiting [her] room.” *Id.* at 54–55. After wrapping herself in a  
9 blanket, the victim went into the hallway and yelled at Sempier to get out of the house. *Id.* at 56–  
10 57.

11 Sempier testified to a different version of events on the morning of August 26, 2011. While  
12 hanging out with the victim and her husband at their residence on August 25, 2011, Sempier  
13 explained that the victim was flirting with him. ECF No. 27-1 at 237, 242. Because he had been  
14 drinking, the victim invited Sempier to spend the night on a couch. *Id.* at 245. After the victim  
15 went to bed, Sempier and the victim’s husband went to 7-Eleven to get more beer and then went  
16 to a casino. *Id.* at 243–44, 247. After returning from the casino, Sempier and the victim’s husband  
17 drank more beer and watched a movie before falling asleep in the living room. *Id.* at 249–50.

18 Sempier woke up approximately 40 minutes later to use the restroom. *Id.* at 251. After  
19 exiting the restroom, Sempier heard the victim ask from the master bedroom, “Where did you guys  
20 go?” *Id.* at 252. Sempier entered the master bedroom through the open door and told the victim  
21 that he and her husband had gone to the bar. *Id.* The victim then asked Sempier to lay next to her  
22 in bed, and Sempier complied. *Id.* The victim asked where her husband was located, and when  
23 Sempier told her that he was asleep in the living room, the victim said, “Oh. Well, scoot closer.”

1 *Id.* at 253. The victim “then began to snug her back end towards closer [sic] to [Sempier’s] pelvic  
2 area and at the same time rub[bed him] on [his] genitalia” while moaning and asking if he liked  
3 that. *Id.* Sempier then unzipped his pants, and the victim “beg[a]n to insert [his penis] into her  
4 vagina.” *Id.* at 254. During this time, Sempier’s cellular telephone kept making noise and Sempier  
5 was concerned about the amount of noise he and the victim were making, so he told the victim “I  
6 can’t do this” and that he “need[ed] to go get [his] phone charger.” *Id.* at 255. Sempier then  
7 “pull[ed] out and [he] believed [he] may have ejaculated.” *Id.*

8 Sempier retrieved his cellular telephone charger from his vehicle outside, and when he  
9 returned to the victim’s house, the victim “just look[ed] at [him] like [she was] mad at [him], like  
10 why did [he] get up and leave in the middle of what was going on.” *Id.* at 256. The victim then  
11 told her husband that Sempier had raped her, and the victim’s husband responded, “You’re  
12 psycho.” *Id.* at 257. The victim then told Sempier to leave. *Id.* Later, during a police interview,  
13 Sempier stated that “[t]here’s a slim possibility that [the victim] . . . may have mistaken [him] for  
14 [her husband]” but he was “pretty positive when [he] walked in that room she realized it was  
15 [him]” due to the fact that “she was looking right at [him].” *Id.* at 277, 289.

16 Following a jury trial, Sempier was found guilty of sexual assault. ECF No. 28-6. Sempier  
17 was sentenced to life with the possibility of parole after ten years and to lifetime supervision. ECF  
18 No. 28-14. Sempier appealed, and the Nevada Supreme Court affirmed on June 13, 2013. ECF No.  
19 29-4. Remittitur issued on July 10, 2013. ECF No. 29-5.

20 Sempier filed a state habeas petition and a counseled, supplemental petition on November  
21 7, 2013, and March 24, 2015, respectively. ECF Nos. 29-15, 30-1. Following an evidentiary  
22 hearing, the state district court denied Sempier’s petition on November 3, 2015. ECF Nos. 34-1,  
23 35-1. Sempier appealed, and the Nevada Court of Appeals dismissed the appeal, concluding that

the state district court's order did not resolve all claims. ECF No. 36-7. On March 31, 2017, the state district court entered an order denying all outstanding claims from Sempier's state habeas petition. ECF No. 36-13. Sempier appealed again, and the Nevada Supreme Court affirmed on July 20, 2018. ECF No. 37-11. Remittitur issued on August 24, 2018. ECF No. 37-13.

Sempier filed a federal habeas petition on February 26, 2019. ECF No. 10. This Court dismissed Ground 8 with prejudice as noncognizable and ordered the Respondents to file a response to the remaining claims in the petition. ECF No. 9. The Respondents answered Sempier's petition on September 9, 2019. ECF No. 21. Sempier replied on November 11, 2019. ECF No. 40.

In his remaining grounds for relief, Sempier alleges the following violations of his federal constitutional rights:

1. His trial counsel failed to present exculpatory evidence and interview witnesses or otherwise investigate the case.
2. His trial counsel failed to address the victim's sexual assault examination or consult with, retain, and use an expert regarding the victim's injuries.
3. His trial counsel failed to present an alternative mistaken-consent defense.
4. His trial counsel failed to oppose or otherwise address the State's motion in limine regarding the victim's domestic battery charge.
5. The State relied on the victim's testimony, which it should have known was false, or, alternatively, his trial counsel failed to address inconsistencies in the victim's testimony.
6. There were cumulative errors.
7. His trial counsel failed to preserve issues for appeal.

ECF No. 10.

## **II. STANDARD OF REVIEW**

28 U.S.C. § 2254(d) sets forth the standard of review generally applicable in habeas corpus cases under the Antiterrorism and Effective Death Penalty Act ("AEDPA"):

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

1 (1) resulted in a decision that was contrary to, or involved an unreasonable application  
2 of, clearly established Federal law, as determined by the Supreme Court of the  
United States; or

3 (2) resulted in a decision that was based on an unreasonable determination of the facts  
4 in light of the evidence presented in the State court proceeding.

5 A state court decision is contrary to clearly established Supreme Court precedent, within the  
6 meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts the governing law  
7 set forth in [the Supreme Court’s] cases” or “if the state court confronts a set of facts that are  
8 materially indistinguishable from a decision of [the Supreme] Court.” *Lockyer v. Andrade*, 538  
9 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell v.*  
10 *Cone*, 535 U.S. 685, 694 (2002)). A state court decision is an unreasonable application of clearly  
11 established Supreme Court precedent within the meaning of 28 U.S.C. § 2254(d) “if the state  
12 court identifies the correct governing legal principle from [the Supreme] Court’s decisions but  
13 unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 75 (quoting *Williams*,  
14 529 U.S. at 413). “The ‘unreasonable application’ clause requires the state court decision to be  
15 more than incorrect or erroneous. The state court’s application of clearly established law must be  
16 objectively unreasonable.” *Id.* (quoting *Williams*, 529 U.S. at 409–10) (internal citation omitted).

17 The Supreme Court has instructed that “[a] state court’s determination that a claim lacks  
18 merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the  
19 correctness of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing  
20 *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has stated “that even a  
21 strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” *Id.*  
22 at 102 (citing *Lockyer*, 538 U.S. at 75); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011)  
23 (describing the standard as a “difficult to meet” and “highly deferential standard for evaluating

1 state-court rulings, which demands that state-court decisions be given the benefit of the doubt”  
2 (internal quotation marks and citations omitted)).

### 3 **III. DISCUSSION**

4       Apart from a portion of Ground 5, Sempier’s remaining claims assert that his trial counsel  
5 was ineffective. In *Strickland*, the Supreme Court propounded a two-prong test for analysis of  
6 claims of ineffective assistance of counsel requiring the petitioner to demonstrate (1) that the  
7 attorney’s “representation fell below an objective standard of reasonableness,” and (2) that the  
8 attorney’s deficient performance prejudiced the defendant such that “there is a reasonable  
9 probability that, but for counsel’s unprofessional errors, the result of the proceeding would have  
10 been different.” *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). A court considering a  
11 claim of ineffective assistance of counsel must apply a “strong presumption that counsel’s conduct  
12 falls within the wide range of reasonable professional assistance.” *Id.* at 689. The petitioner’s  
13 burden is to show “that counsel made errors so serious that counsel was not functioning as the  
14 ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. Additionally, to establish  
15 prejudice under *Strickland*, it is not enough for the habeas petitioner “to show that the errors had  
16 some conceivable effect on the outcome of the proceeding.” *Id.* at 693. Rather, the errors must be  
17 “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* at 687.

18       Where a state court previously adjudicated the claim of ineffective assistance of counsel  
19 under *Strickland*, establishing that the decision was unreasonable is especially difficult. *See*  
20 *Harrington*, 562 U.S. at 104–05. In *Harrington*, the United States Supreme Court clarified that  
21 *Strickland* and § 2254(d) are each highly deferential, and when the two apply in tandem, review is  
22 doubly so. *Id.* at 105; *see also Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010) (internal  
23 quotation marks omitted) (“When a federal court reviews a state court’s *Strickland* determination

1 under AEDPA, both AEDPA and *Strickland*'s deferential standards apply; hence, the Supreme  
2 Court's description of the standard as doubly deferential."). The Supreme Court further clarified  
3 that, "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable.  
4 The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s  
5 deferential standard." *Harrington*, 562 U.S. at 105.

6 This Court will now address Sempier's seven remaining claims in turn.

7 **A. Ground 1**

8 In Ground 1, Sempier argues that his trial counsel failed to present exculpatory evidence  
9 and interview witnesses or otherwise investigate the case. ECF No. 10 at 3. Specifically, Sempier  
10 argues that his trial counsel should have played a recording made of the victim and her husband  
11 following the sexual assault as well as the 9-1-1 tape recording and called for the testimony from  
12 the victim's neighbors. Sempier argues that this evidence would have revealed that the victim had  
13 sexual relationships with men other than her husband during their marriage, that her husband did  
14 not initially believe she was sexually assaulted, and that the victim had a motive to lie because she  
15 had just recently gotten back together with her husband following a separation. *Id.* at 31–34.  
16 Sempier asserts that this evidence would have been allowed as evidence in his trial as an exception  
17 to the rape shield statute because it was for purposes of addressing credibility. *Id.* at 34 (citing, in  
18 part, Nev. Rev. Stat. §§ 48.069 and 48.045). Sempier also asserts that his trial counsel should have  
19 investigated the fact that the victim's husband apologized to his neighbors, relatives of Sempier,  
20 which again demonstrated that he did not believe that his wife had been assaulted; investigated the  
21 fact that the victim had reportedly flirted with Sempier prior to the sexual assault; and investigated  
22 a similar incident whereby the victim had a sexual encounter with another one of her husband's  
23 friends after a night of drinking. *Id.* at 39–42.

Ground 1 is more easily addressed when broken down into subparts. However, before moving into the subparts of Ground 1, this Court notes that defense counsel has a “duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691. Additionally, “[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” *Id.* This investigatory duty includes investigating the defendant’s “most important defense” (*Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir. 1994)), and investigating and introducing evidence that demonstrates factual innocence or evidence that raises sufficient doubt about the defendant’s innocence. *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999). “[I]f counsel’s failure to investigate possible methods of impeachment is part of the explanation for counsel’s impeachment strategy (or a lack thereof), the failure to investigate may in itself constitute ineffective assistance of counsel.” *Reynoso v. Giurbino*, 462 F.3d 1099, 1112 (9th Cir. 2006).

#### **1. Ground 1(a): evidence of the victim’s troubled marriage**

In affirming the denial of Sempier’s state habeas petition, the Nevada Supreme Court held:

Sempier claims that trial counsel should have investigated and presented evidence showing that the victim and her husband had a volatile relationship and the victim had a pattern of acting irrationally in an attempt to elicit attention from her husband and manipulate or punish him. Specifically, Sempier points to the following evidence: testimony that the victim on one occasion confronted her husband at a bar and expressed anger that he was out drinking with friends; testimony that the victim had sexual relationships with other men during her marriage and that she and her husband drank and fought a lot; an audio recording of an argument between the victim and her husband occurring a few days after the sexual assault; and a domestic-abuse incident between the victim and her husband occurring after the sexual assault. Sempier claims that this evidence proves that the victim was a troubled individual who had a motive to make up allegations of sexual assault. Sempier fails to demonstrate that counsel’s performance was deficient. Trial counsel testified at the evidentiary hearing that the theory of defense at trial was that Sempier and the victim had consensual sex but the victim was worried that her husband would find out and therefore made up the allegations about sexual assault



1 in an attempt to save her marriage. At trial, counsel elicited testimony from the  
2 victim and her husband that they had been separated and living apart for a year and  
3 that the victim had recently moved back in with her husband and was trying to work  
4 on their marriage. Though counsel was aware of additional evidence indicating that  
5 the victim had a troubled relationship with her husband, he chose not to use that  
6 evidence at trial because it was cumulative, inadmissible under Nevada's rape  
7 shield statute, or not helpful to his defense. We conclude that Sempier fails to  
8 demonstrate that counsel's choice of defense was objectively unreasonable. *See*  
9 *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (stating that  
10 trial counsel's tactical decisions are virtually unchallengeable); *see also Rios v.*  
11 *Rocha*, 299 F.3d 796, 807 (9th Cir. 2002) ("Once counsel reasonably selects a  
12 defense, it is not deficient performance to fail to pursue alternative defenses.").  
13 Therefore, the district court did not err in denying this claim.

14 ECF No. 37-11 at 3–4. The Nevada Supreme Court's rejection of Sempier's *Strickland* claim was  
15 neither contrary to nor an unreasonable application of clearly established law as determined by the  
16 United States Supreme Court.

17 Sempier avers that his trial counsel should have investigated and introduced various pieces  
18 of evidence demonstrating the contentious relationship between the victim and her husband. First,  
19 Darren Bakondi, the casino manager of Bordertown Casino, testified at the post-conviction  
20 evidentiary hearing that weeks prior to the sexual assault, the victim came to the casino while her  
21 husband was there with Sempier, Richard Vigil, and the Cuevas brothers because "[s]he was upset  
22 he was out drinking with friends and she said he needed to come home and she wasn't leaving  
23 unless he left as well." ECF No. 34-1 at 109, 113. Second, Carrie Gillespie, who lived with the  
24 Cuevas brothers and Vigil next door to the victim and the victim's husband, recorded a  
25 conversation between the victim and the victim's husband a few days after the sexual assault took  
26 place. ECF No. 32-1 at 157. In the recording, the victim told her husband, "I'm going to go to [sic]  
27 fuck the whole block." *Id.* at 158. The victim's husband responded, "[w]e should call Detective  
28 Bowen and have him come over here right now. Maybe he could video - - video-camera this and  
29 then put it on fucking recording what we got going on with your bullshit." *Id.* Third, Gillespie and

1 James Cuevas both had information about the victim’s relationship with her husband. Gillespie  
2 testified at the post-conviction evidentiary hearing that the victim and her husband would fight  
3 constantly about “[h]er sleeping with other guys.” ECF No. 34-1 at 125. The day prior to the sexual  
4 assault, the victim asked Gillespie what she could do to make her husband stop spending time with  
5 another female neighbor. *Id.* at 126. And Cuevas testified at the post-conviction evidentiary  
6 hearing that the victim and her husband had a “horrible relationship” and that the victim’s husband  
7 “kept wondering if [his wife] was cheating on him.” *Id.* at 154-55, 165. Fourth, a domestic violence  
8 incident occurred between the victim and her husband following the sexual assault, which was  
9 brought about because the victim “was upset over the way her husband had responded to her  
10 allegation of sexual assault.”<sup>1</sup> *Id.* at 45.

11 Sempier’s trial counsel testified at the post-conviction evidentiary hearing that he met with  
12 Gillespie, who provided him with the recording that she had made between the victim and the  
13 victim’s husband. ECF No. 34-1 at 38–40. When asked why he did not use the recording at trial,  
14 Sempier’s trial counsel responded that he could not “really recall for sure,” but he thought he  
15 “perceived some reluctance on Ms. Gillespie’s part to be part of this proceeding” and he “needed  
16 her to authenticate” the recording if it was even admissible in the first place. *Id.* at 40. Sempier’s  
17 trial counsel’s strategy was “to focus on what happened” at the time of the sexual assault, so he  
18 “didn’t do any investigation about the recording, any further or anything else that happened after  
19 the alleged incident.” *Id.* at 51. Instead, Sempier’s trial counsel argued that the victim needed to  
20 fabricate the sexual assault to continue reconciling her relationship with her husband. *Id.* at 55–56.

21 The Nevada Supreme Court reasonably determined that Sempier’s trial counsel was not  
22 deficient. *Strickland*, 466 U.S. at 688. As the Nevada Supreme Court reasonably noted, the victim  
23

---

<sup>1</sup> This domestic violence incident is addressed further in Ground 4.

1 testified at the trial that she was separated from her husband from September 2010 until January  
 2 2011 and that she moved out of their residence during that period. ECF No. 26-1 at 87. Therefore,  
 3 the jury was aware that the victim and her husband were having some difficulties in their marriage  
 4 and that they were attempting to reconcile at the time of the sexual assault. Sempier's trial counsel  
 5 could have presented the additional evidence outlined previously to highlight further issues with  
 6 the couple's relationship; however, highlighting these issues would have tended to negate  
 7 Sempier's trial counsel's defense that the victim wanted to keep reconciling with her husband and  
 8 fabricated the sexual assault in order to do so. As the Nevada Supreme Court reasonably  
 9 determined, this strategy was not objectively unreasonable. *See Harrington*, 562 U.S. at 107 (2011)  
 10 ("Counsel was entitled to formulate a strategy that was reasonable at the time."). Accordingly,  
 11 because the Nevada Supreme Court reasonably denied Sempier's ineffective-assistance-of-trial-  
 12 counsel claim, Sempier is denied federal habeas relief for Ground 1(a).

## 13                   **2.       Ground 1(b): the victim's husband's disbelief regarding the assault**

14           In affirming the denial of Sempier's state habeas petition, the Nevada Supreme Court held:

15           Sempier argues that trial counsel should have presented evidence showing that the  
 16           victim's husband did not believe the victim's allegations of sexual assault, which  
 17           would have made the victim less credible. Sempier fails to demonstrate that  
 18           counsel's performance was deficient or that he was prejudiced. Counsel elicited  
 19           testimony from the husband that he did not immediately believe the victim when  
 20           she told him that Sempier raped her. While Sempier contends that counsel should  
 21           have introduced the victim's 911 call and a police officer's statement, this evidence  
 22           would have shown only that the husband did not believe the victim when she first  
 23           reported the offense, which would have been cumulative of the husband's  
           testimony. The other evidence that Sempier alleges should have been presented—  
           the audio recording of an argument between the victim and her husband, a police  
           report about a domestic-abuse incident between the victim and her husband, and  
           testimony by Sempier's cousin that the victim's husband apologized to him days  
           after the sexual assault—did not clearly indicate that the husband did not believe  
           the victim. Furthermore, Sempier has failed to provide this court with an adequate  
           appendix containing the complete trial transcripts for this court's review on appeal.  
           *See* NRAP 30(b)(1) ("Copies of all transcripts that are necessary to the Supreme  
           Court's or Court of Appeals' review of the issues presented on appeal shall be

1 included in the appendix.”); NRAP 30(b)(3) (appellant’s appendix shall include any  
2 “portions of the record essential to determination of the issues raised in appellant’s  
3 appeal”); *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) (“The burden  
4 to make a proper appellate record rests on appellant.”). Accordingly, Sempier  
cannot demonstrate that the district court erred in concluding he did not show a  
reasonable probability of a different outcome at trial. Therefore, the district court  
did not err in denying this claim.

5 ECF No. 37-11 at 4–5. The Nevada Supreme Court’s rejection of Sempier’s *Strickland* claim was  
6 neither contrary to nor an unreasonable application of clearly established law as determined by the  
7 United States Supreme Court.

8 The victim’s husband testified that when his wife woke up him to tell him that she had  
9 been raped, he asked if she was “dreaming right now” and told her that she was “being a little  
10 psycho because [Sempier is] right here,” pointing at a couch in the living room. ECF No. 27-1 at  
11 55. However, when the victim’s husband “look[ed] at the couch[,] there’s nobody there.” *Id.* While  
12 this evidence demonstrated that the victim’s husband did not initially believe the victim’s sexual  
13 assault allegations, Sempier argues that his trial counsel should have presented further evidence  
14 that the victim’s husband continued to not believe her, including the audio recording and the  
15 domestic violence incident that were discussed in Ground 1(a). Sempier also desired to have his  
16 trial counsel introduce testimony from James Cuevas that following the sexual assault, the victim’s  
17 husband “kind of stumble[d] in[to Cuevas’] house apologizing to [him] right when he got in the  
18 house all the way to the kitchen.” ECF No. 34-1 at 159.

19 The Nevada Supreme Court reasonably concluded that Sempier failed to demonstrate that  
20 his trial counsel acted deficiently. *Strickland*, 466 U.S. at 688. As the Nevada Supreme Court  
21 reasonably determined, this additional evidence did not clearly show that the victim’s husband did  
22 not believe her, so Sempier’s trial counsel’s failure to introduce this evidence did not fall “below  
23 an objective standard of reasonableness.” *Id.* First, the victim’s husband indicated on the audio

1 recording that he should call the detective to show him “what we got going on with your bullshit.”  
2 ECF 32-1 at 157. It is uncertain from the record to what “bullshit” the victim’s husband is referring.  
3 Second, while the domestic violence incident was brought about because the victim “was upset  
4 over the way her husband had responded to her allegation of sexual assault,” it is unclear what  
5 response she was unhappy with. ECF No. 34-1 at 45. Third, Cuevas testified that he did not know  
6 what the victim’s husband was apologizing about when he came over a little while after the sexual  
7 assault. ECF No. 34-1 at 159. Therefore, because the Nevada Supreme Court reasonably denied  
8 Sempier’s ineffective-assistance-of-trial-counsel claim, Sempier is denied federal habeas relief for  
9 Ground 1(b).

10 **3. Ground 1(c): the victim’s affair and accusation of sexual assault**

11 In affirming the denial of Sempier’s state habeas petition, the Nevada Supreme Court held:

12 Sempier argues that trial counsel should have investigated and presented evidence  
13 that the victim had previously had an affair with another man while married and  
14 that she had falsely accused that man of sexual assault. Sempier fails to demonstrate  
15 that counsel’s performance was deficient or that he was prejudiced. Evidence that  
16 the victim had a sexual relationship four years before the sexual assault had little  
17 relevance and likely would have been inadmissible under Nevada’s rape shield  
statute, NRS 50.090. While the rape shield statute would not bar evidence of prior  
false accusations of sexual assault, *see Miller v. State*, 105 Nev. 497, 500–01, 779  
P.2d 87, 89 (1989), the evidence presented at the evidentiary hearing failed to prove  
that the victim had made a false accusation of sexual assault or that counsel should  
have known about it. Therefore, the district court did not err in denying this claim.

18 ECF No. 37-11 at 5. The Nevada Supreme Court’s rejection of Sempier’s *Strickland* claim was  
19 neither contrary to nor an unreasonable application of clearly established law as determined by the  
20 United States Supreme Court.

21 In an affidavit prepared for Sempier’s post-conviction proceedings, James McClain stated  
22 he went to the victim and the victim’s husband’s residence in April 2007. ECF No. 32-1 at 182.  
23 During that encounter, the victim’s husband “drank to the point that he passed out on a couch in

1 the family room, and “[w]hile [the victim’s husband] was passed out, [the victim] came on to  
2 [McClain] by inquiring . . . about [his] karate knowledge.” *Id.* McClain explained that “[o]ne thing  
3 led to another and [he and the victim] had sex on the living room floor while [the victim’s husband]  
4 was passed out in the family room and their daughter was asleep in her bedroom.” *Id.* McClain  
5 and the victim “continued an affair for approximately 3–4 months.” *Id.*

6 At the post-conviction evidentiary hearing, Gillespie testified that she thought she “told  
7 [Sempier’s trial counsel] about” McClain and that the victim “told everybody he raped her.” ECF  
8 No. 34-1 at 127–28, 132–33. Contrarily, Sempier’s trial counsel testified at the post-conviction  
9 evidentiary hearing that he had not heard of McClain before reading Sempier’s supplemental state  
10 habeas petition. *Id.* at 53. However, Sempier’s trial counsel also testified that “[b]ased on [his]  
11 understanding of Nevada’s rape shield law . . . the victim’s prior sexual conduct four years prior  
12 to [the] alleged sexual assault” would not have been admissible regardless of his knowledge of  
13 McClain’s existence. *Id.* at 83.

14 Even if Sempier’s trial counsel was deficient for not interviewing McClain after allegedly  
15 being told about his existence by Gillespie, the Nevada Supreme Court reasonably determined that  
16 Sempier failed to demonstrate prejudice. *Strickland*, 466 U.S. at 694. First, the Nevada Supreme  
17 Court, the final arbiter of Nevada law, noted that the victim’s relationship with McClain would  
18 likely have been inadmissible pursuant to Nevada law. *See Nev. Rev. Stat. § 50.090* (“In any  
19 prosecution for sexual assault . . . the accused may not present evidence of any previous sexual  
20 conduct of the victim of the crime to challenge the victim’s credibility as a witness.”). Second, as  
21 the Nevada Supreme Court reasonably noted, there was insufficient evidence presented that the  
22 victim accused McClain of raping her. Gillespie’s knowledge of the alleged rape came only  
23 statements from McClain’s wife (ECF No. 34-1 at 127), and, importantly, McClain did not wish

1 to testify at the post-conviction evidentiary hearing and did not posit that he was accused of rape  
2 in his affidavit. (*See* ECF No. 34-1 at 21; ECF No. 32-1 at 183.) Thus, because the Nevada  
3 Supreme Court reasonably denied Sempier's ineffective-assistance-of-trial-counsel claim,  
4 Sempier is denied federal habeas relief for Ground 1(c).

5 **4. Ground 1(d): the victim's neighbors**

6 In affirming the denial of Sempier's state habeas petition, the Nevada Supreme Court held:

7 Sempier argues that trial counsel should have interviewed and called four witnesses  
8 to testify about the victim's untruthfulness. Sempier fails to demonstrate that  
9 counsel's performance was deficient or that he was prejudiced. Counsel testified  
10 that he had spoken to one of the witnesses but decided not to call her as a witness  
11 because her statements about the victim were based on rumors and speculation. The  
12 witnesses' testimony at the evidentiary hearing revealed that they had little or no  
13 personal knowledge of the victim's character and their opinions regarding her  
14 truthfulness were due to her unfaithfulness to her husband. Sempier fails to  
15 demonstrate that counsel's concerns about the admissibility of such evidence was  
16 unreasonable or that there was a reasonable probability of a different result had  
17 counsel presented this testimony. Therefore, the district court did not err in denying  
18 this claim.

14 ECF No. 37-11 at 5–6. The Nevada Supreme Court's rejection of Sempier's *Strickland* claim was  
15 neither contrary to nor an unreasonable application of clearly established law as determined by the  
16 United States Supreme Court.

17 In an affidavit, Gillespie stated, "[b]ased upon [her] interactions with [the victim and her  
18 husband] and statements made to [her] by [the victim's husband] subsequent to the incident at  
19 issue, [she] ha[d] cause to believe that [the victim] accused [Sempier] of sexual assault to  
20 manipulate [her husband]." ECF No. 32-1 at 162. And during the post-conviction evidentiary  
21 hearing, Gillespie testified that the victim was not truthful, which was based on the victim  
22 "cheating on her husband all the time." ECF No. 34-1 at 127, 145. Likewise, James Cuevas stated  
23 in an affidavit that the victim had a contentious relationship with her husband and was physically

1 aggressive to him. ECF No. 32-1 at 164. However, at the post-conviction evidentiary hearing,  
2 Cuevas testified that he did not have any personal experience with the victim being truthful or not  
3 truthful. ECF No. 34-1 at 164. Finally, in near identical affidavits, Wallace and Amanda  
4 Armstrong, neighbors to the victim and her husband, both stated “it was always [their] belief that  
5 [the victim] falsely accused [Sempier] of sexual assault for the purpose of disguising her behavior  
6 with [Sempier] to [her husband].” ECF No. 32-1 at 167, 170. However, similar to Cuevas, Wallace  
7 Armstrong testified at the post-conviction evidentiary hearing that he had not “spent enough time  
8 with [the victim] to know if she would be a liar” and did not remember whether he knew of “any  
9 instances where [he] found her to be untruthful.” ECF No. 34-1 at 173–74. Instead, his doubt  
10 regarding the sexual assault was due to the victim’s “faithfulness to her husband.” *Id.* at 175.  
11 Similarly, Amanda Armstrong testified at the post-conviction evidentiary hearing that she was  
12 concerned about the victim’s truthfulness because the victim “hid relationships.” *Id.* at 184–85.

13 Sempier’s trial counsel testified that he spoke to neither James nor Steve Cuevas,<sup>2</sup> but  
14 “nobody was really volunteering any information too much besides Ms. Gillespie.” ECF No. 34-1  
15 at 50–51. And regarding Gillespie, Sempier’s trial counsel simply “got the same vibe from her that  
16 Mr. Sempier had been giving [him] about [the victim] being this kind of person, and so [he] wasn’t  
17 getting anything from her that [he] didn’t already sense from the case.” *Id.* at 97. In fact, Gillespie  
18 and the other neighbors never gave him anything “specific other than the [audio recording],” and  
19 while “[t]hey were sympathetic to Mr. Sempier, . . . they weren’t witnesses to th[e] event.” *Id.*

20 Although Sempier’s trial counsel may not have interviewed both Cuevas brothers or the  
21 Armstrongs or called Gillespie to testify, the Nevada Supreme Court reasonably determined that  
22 Sempier failed to demonstrate that his trial counsel was deficient or that he was prejudiced.

---

23 <sup>2</sup> James Cuevas testified at the post-conviction evidentiary hearing that he never spoke with  
Sempier’s trial counsel. ECF No. 34-1 at 157.



1 *Strickland*, 466 U.S. at 688, 694; *see also United States v. Berry*, 814 F.2d 1406, 1409 (9th Cir.  
2 1987) (denying an ineffective-assistance-of-counsel claim based on counsel’s refusal to call  
3 witnesses because the defendant “offers no indication of . . . how their testimony might have  
4 changed the outcome of the hearing”); *Lewis v. Mazurkiewicz*, 915 F.2d 106, 113 (3d Cir. 1990)  
5 (explaining that “trial counsel [is] not bound by an inflexible constitutional command to interview  
6 every possible witness”; rather, “counsel [is] simply required to exercise reasonable professional  
7 judgment in deciding” who to interview). There is no indication in the record that Sempier’s trial  
8 counsel was alerted to the need to interview possible witnesses, especially the Armstrongs, who  
9 were not present or mentioned regarding the evening in question. *See Babbitt v. Calderon*, 151  
10 F.3d 1170, 1174 (9th Cir. 1998) (“[C]ounsel is not deficient for failing to find mitigating evidence  
11 if, after a reasonable investigation, nothing has put the counsel on notice of the existence of that  
12 evidence.”). Indeed, Sempier’s trial counsel testified that nobody contacted him to report that they  
13 had relevant information. *See* ECF No. 34-1 at 50–51. Moreover, as the Nevada Supreme Court  
14 reasonably noted, none of the witnesses actually claimed to have personal knowledge of the  
15 victim’s truthfulness, so their testimony would not have been admissible even if they were  
16 interviewed. *See* Nev. Rev. Stat. § 50.085(2) (“Evidence of the reputation of a witness for  
17 truthfulness or untruthfulness is inadmissible.”). As such, because the Nevada Supreme Court  
18 reasonably denied Sempier’s ineffective-assistance-of-trial-counsel claim, Sempier is denied  
19 federal habeas relief for Ground 1(d).

## 20 **5. Ground 1(e): the victim’s flirting**

21 In affirming the denial of Sempier’s state habeas petition, the Nevada Supreme Court held:

22 Sempier argues that trial counsel should have called Sempier’s cousin to testify  
23 that, during the evening preceding the sexual assault, the victim had been staring at  
Sempier and talking to him in a way the cousin found to be flirtatious. Sempier fails  
to demonstrate that counsel’s performance was deficient or that he was prejudiced.

1 Counsel elicited testimony at trial about the victim's interactions with Sempier on  
2 the evening of the sexual assault, and Sempier fails to demonstrate a reasonable  
3 probability of a different outcome at trial had the jury heard his cousin's  
characterizations of the victim's behavior as flirtatious. Therefore, the district court  
did not err in denying this claim.

4 ECF No. 37-11 at 6. The Nevada Supreme Court's rejection of Sempier's *Strickland* claim was  
5 neither contrary to nor an unreasonable application of clearly established law as determined by the  
6 United States Supreme Court.

7 James Cuevas testified at the post-conviction evidentiary hearing that the evening before  
8 the sexual assault, the victim was intoxicated and flirting with Sempier. ECF No. 34-1 at 155.  
9 Cuevas explained that the victim "was staring at only [Sempier] the whole time" they were playing  
10 music. *Id.* at 156. Similarly, in an affidavit prepared for Sempier's post-conviction state  
11 proceedings, James Cuevas stated that the evening before the sexual assault, he saw the victim  
12 "making eye contact with [Sempier] and vice versa in a way [he] believe[d] to be very flirtatious."  
13 ECF No. 32-1 at 164. And, although not related to Sempier, Gillespie reported that "it ha[d] been  
14 [her] experience that [the victim] is always very flirtatious." ECF No. 32-1 at 161.

15 Even if Sempier's trial counsel was deficient for not investigating and calling Cuevas and  
16 Gillespie to testify about the victim's flirtatious behavior, the Nevada Supreme Court reasonably  
17 concluded that Sempier failed to demonstrate prejudice. *Strickland*, 466 U.S. at 694. The victim's  
18 behavior towards Sempier the night prior to the sexual assault was addressed extensively at trial.  
19 The victim testified that she showed Sempier her sketches, compared games on their cellular  
20 telephones, and offered to introduce Sempier to her single friend. ECF No. 26-1 at 41–42. And  
21 again during cross-examination, the victim testified that she chatted with Sempier, compared  
22 games on their cellular telephones while sitting closely together, showed him some of her sketches,  
23 and suggested that one of her girlfriends may be interested in meeting him. *Id.* at 95. The victim

1 also testified that she asked Sempier to “sing with [her] in the bathroom.” *Id.* at 96–97.  
2 Accordingly, Sempier’s trial counsel’s testimony during the post-conviction evidentiary hearing  
3 that he “established at trial that [the victim] was flirtatious” towards Sempier (ECF No. 34-1 at  
4 104–05) appears to be accurate, such that the introduction of addition testimony about the victim’s  
5 behavior being characterized as “flirtatious” would not have rendered a different result at trial.  
6 Because the Nevada Supreme Court reasonably denied Sempier’s ineffective-assistance-of-trial-  
7 counsel claim, Sempier is denied federal habeas relief for Ground 1(e).

8 **B. Ground 2**

9 In Ground 2, Sempier argues that his trial counsel failed to address the Sexual Assault  
10 Response Team examination of the victim or consult with, retain, and use an expert, such as  
11 Kathleen Peele, APN, CPNP, APH, to identify weaknesses in the victim’s sexual assault  
12 examination. ECF No. 10 at 5, 55–57. Sempier also argues that his trial counsel failed to object to  
13 the State’s closing argument about the examination, which misrepresented the evidence. *Id.* at 52–  
14 53, 55.

15 In affirming the denial of Sempier’s state habeas petition, the Nevada Supreme Court held:

16 Sempier contends that trial counsel should have objected to the SART nurse’s  
17 reliance on outdated statistics or retained a rebuttal expert to testify that the injury  
18 to the victim was not indicative of sexual assault. Sempier fails to demonstrate that  
19 counsel’s performance was deficient or that he was prejudiced. The nurse testified  
20 that the victim had a vaginal injury that was commonly caused by sexual  
21 penetration and was found in 70% of sexual assault victims. Counsel elicited  
22 testimony from the nurse that the statistic was from an old study, that new studies  
23 indicated the injury occurs just as often during consensual sex, and that she was  
unable to determine when the victim’s injury occurred or whether it was caused by  
sexual assault as opposed to consensual sex. Because the issue at trial was not  
whether sex occurred, but rather whether the sex was consensual, Sempier fails to  
show that counsel’s cross-examination of the nurse was inadequate or that further  
testimony about other causes of the vaginal injury would have been helpful to his  
defense. Therefore, the district court did not err by denying this claim.

1 . . . Sempier argues that trial counsel should have objected during closing arguments  
2 to the State's misrepresentations of the SART nurse's testimony about the  
3 frequency of injury in sexual assault cases. Sempier fails to demonstrate that  
4 counsel's performance was deficient or that he was prejudiced. The State's closing  
5 argument did not mischaracterize the nurse's testimony, and counsel addressed the  
6 statement and emphasized the nurse's testimony that the injury did not prove lack  
7 of consent. Therefore, the district court did not err by denying this claim.

8  
9 ECF No. 37-11 at 7–8. The Nevada Supreme Court's rejection of Sempier's *Strickland* claim was  
10 neither contrary to nor an unreasonable application of clearly established law as determined by the  
11 United States Supreme Court.

12  
13 Debbie Robison, a sexual assault nurse examiner, testified that she performed a sexual  
14 assault examination on the victim on the morning of August 26, 2011. ECF No. 27-1 at 131, 139.  
15 The victim "had a tear to her posterior fourchette." *Id.* at 142. Robison explained that this injury  
16 could come from "having consensual relations," and when asked how often victims of sexual  
17 assault get an injury like that, she explained, "[t]he stats are kind of all over the place but . . . of all  
18 sexual assault examinations, about 70 percent have a posterior fourchette injury." *Id.* at 145. The  
19 victim indicated to Robison that she "had had consensual relations with her husband . . . two days  
20 prior to her examination." *Id.* at 144. During cross-examination by Sempier's counsel, Robison  
21 testified that she could not "date when [the] tear occurred" and could not "tell how it occurred."  
22 *Id.* at 155. When asked about the statistics she referenced during direct examination, Robinson  
23 explained:

[T]he statistics we use are, again, from a study from 1997, there's new studies out  
in 2010, 2011 that indicate that there's as much injury with consensual sex as there  
is with non-consensual sexual activities. There's some studies that . . . say that in  
some cases they did a study where they had women withhold from sex three days,  
then they checked them for injury and in 11 percent of those they still have injuries,  
so apparently we injure ourselves frequently and we don't even know it. And then  
there's some studies who say that there's just as much injury in consensual sex as  
there is non-consensual sex, however, in consensual sex you may have one injury  
versus in non-consensual sex you'll have more than one injury. So basically what

1 the general consensus is is [sic] there aren't any studies big enough with enough  
2 control to be able to say for certainty what - - you know, that this is definitely injury  
3 secondary to sexual assault and this is definitely injury that is more consistent with  
4 consensual sexual activity.

5 *Id.* at 156.

6 Later, the State made the following statements during its closing argument regarding  
7 Robison's testimony:

8 What else did SART nurse Roberson [sic] tell you that's a golden nugget? There  
9 was a tear on the posterior fourchette. Now, she went into a bunch of illustrations,  
10 but it doesn't negate the fact that she testified that that occurs at 70 percent of the  
11 time in sexual assaults. That's a golden nugget.

12 ECF No. 28-3 at 24. In response, Sempier's trial counsel made the following comment during his  
13 closing argument:

14 This tear identified by Nurse Roberson [sic], you know, take it for what it's worth.  
15 According to her, it was only the distance between your fingernail - - her fingernails  
16 in size. It was an of unknown age, it was of unknown cause. And perhaps most  
17 importantly, she said that this type of injury is common, very common in  
18 consensual sex. It's not proof of some kind of unlawful rape. A tear like that does  
19 not prove lack of consent.

20 *Id.* at 42.

21 During Sempier's post-conviction evidentiary hearing, Sempier's trial counsel explained  
22 that he "wasn't impressed with [Robison's] opinion" because she relied on "fuzzy science" during  
23 her testimony, explaining to the jury that "the statistics are all over the place about this." ECF No.  
34-1 at 60-61. Sempier's trial counsel emphasized that Robison also "testified that it was equally  
as likely that whatever this injury was, as minor as it was, that it could have occurred during the  
course of consensual sex." *Id.* at 61. Due to this testimony, Sempier's trial counsel believed that  
"[t]he cross-examination of her went [his] way," that Robison did not "mak[e] a big impression"  
on the jury, and Robison's testimony did not have "a lot of impact." *Id.* at 61, 63-64.

1 Sempier included an affidavit of Kathleen M. Peele, APN, C-PNP, APH, in his  
2 supplemental state habeas petition. ECF No. 30-1 at 138. In that affidavit, dated February 4, 2015,  
3 Peele, “a licensed pediatric nurse practitioner with specific training and qualifications with respect  
4 to sexual assault examinations,” reviewed the applicable documents and videotape of the victim’s  
5 sexual assault examination and concluded that she was “unable to substantiate a tear to [the  
6 victim’s] posterior fourchette,” instead reporting that it “appear[ed] to be a small tear to [the  
7 victim’s] fossa novicularis.” *Id.* Peele explained that “[b]ecause such an injury can be caused by  
8 consensual sexual intercourse, and based upon [the victim’s] report of sexual activity two days  
9 prior to the exam, it cannot be ruled out that the tear at issue was caused by the prior reported  
10 sexual activity.” *Id.* at 139. Peele also explained that “there is absolutely no credible scientific  
11 basis to claim that such injuries occur in seventy percent (70%) of sexual assaults.” *Id.* Peele  
12 believed that Robison should have also “include[d] an inspection and report as to the anus” and  
13 cervix. *Id.* Finally, Peele “question[ed] that the tear at issue could have been caused by sexual  
14 intercourse undertaken from behind and under the circumstances [the victim] reported.” *Id.*

15 Peele testified in a similar fashion at the post-conviction evidentiary hearing, but she  
16 further explained that more information regarding the timing of the victim’s injury could have  
17 been established if she had been “brought back for a reexamination.” ECF No. 34-1 at 205. Peele  
18 also testified that the victim’s injury was minor, that the victim’s injury as “more consistent with  
19 the sexual position [the victim] reported having with her husband,” and that in a consensual sexual  
20 encounter “you will see at least two or more injuries.” *Id.* at 206, 230, 232.

21 The Nevada Supreme Court reasonably determined that Sempier failed to demonstrate that  
22 his trial counsel was deficient regarding cross-examining Robison or not obtaining an expert to  
23 counter Robison’s testimony. *Strickland*, 466 U.S. at 688. As the Nevada Supreme Court

1 reasonably noted, Sempier’s trial counsel effectively cross-examined Robison. *See Harrington*,  
2 562 U.S. at 111 (“In many instances cross-examination will be sufficient to expose defects in an  
3 expert’s presentation.”) In fact, Sempier’s trial counsel got Robison to admit that she could not tell  
4 how the victim’s injury occurred, that newer statistics show “that there’s as much injury with  
5 consensual sex as there is with non-consensual sexual activities,” and that non-consensual sexual  
6 activity usually results in more than just one injury. ECF No. 27-1 at 155–56.

7 Further, while Peele’s testimony was contradictory to Robison in some respects, it cannot  
8 be concluded that Sempier’s trial counsel was deficient for not calling a rebuttal witness like Peele.  
9 *See Harrington*, 562 U.S. at 111 (“*Strickland* does not enact Newton’s third law for the  
10 presentation of evidence, requiring for every prosecution expert an equal and opposite expert from  
11 the defense.”); *Duncan v. Ornoski*, 528 F.3d 1222, 1235 (9th Cir. 2008) (“[W]hen the prosecutor’s  
12 expert witness testifies about pivotal evidence or directly contradicts the defense theory, defense  
13 counsel’s failure to present expert testimony on that matter may constitute deficient  
14 performance.”). Peele’s testimony may have been beneficial to Sempier’s defense,<sup>3</sup> but that does  
15 not change the fact that Sempier’s trial counsel was able to effectively cross-examine Robison to  
16 rebut the State’s case, negating any alleged requirement that he call an expert of his own.

17 Turning to the State’s comments during closing argument, the Nevada Supreme Court  
18 again reasonably determined that Sempier’s trial counsel was not deficient. *Strickland*, 466 U.S.  
19 at 688. First, the State did not mischaracterize Robison’s testimony—rather it only focused on the  
20 portion of her testimony that was helpful to it: the older statistics regarding the victim’s injury. *See*  
21 ECF No. 28-3 at 24. Second, Sempier’s trial counsel refuted the State’s closing argument during  
22

23 <sup>3</sup> For example, Peele’s testimony that the victim’s injuries were more consistent with the sexual  
position she used with her husband would certainly have been helpful to Sempier’s defense.

1 his rebuttal argument, pointing out that Robison testified that the victim's injury was "very  
2 common in consensual sex." *Id.* at 42.

3 Accordingly, because the Nevada Supreme Court reasonably denied Sempier's ineffective-  
4 assistance-of-trial-counsel claim, Sempier is denied federal habeas relief for Ground 2.

5 **C. Ground 3**

6 In Ground 3, Sempier argues that his trial counsel should have presented a reasonable-  
7 mistaken-belief-of-consent defense in addition to a consent defense. ECF No. 10 at 7, 58, 60. In  
8 affirming the denial of Sempier's state habeas petition, the Nevada Supreme Court held:

9 Sempier argues that trial counsel should have presented and requested a jury  
10 instruction on the defense of a reasonable mistaken belief of consent. Sempier fails  
11 to demonstrate that counsel's performance was deficient. Given Sempier's trial  
12 testimony that the victim initiated the sexual intercourse and that he was "100%  
13 positive" that the victim knew it was him and not her husband, it was not objectively  
unreasonable for trial counsel to argue consent, rather than a mistaken belief in  
consent, as the theory of defense. Therefore, the district court did not err in denying  
this claim.

14 ECF No. 37-11 at 8. The Nevada Supreme Court's rejection of Sempier's *Strickland* claim was  
15 neither contrary to nor an unreasonable application of clearly established law as determined by the  
16 United States Supreme Court.

17 As was noted previously, Sempier testified at trial that as he was exiting the restroom on  
18 the morning of August 26, 2011, he heard the victim ask from the master bedroom, "Where did  
19 you guys go?" ECF No. 27-1 at 252. Sempier entered the master bedroom and told the victim that  
20 he and her husband had gone to "[t]he bar." *Id.* After Sempier followed the victim's request to lay  
21 next to her in bed, the victim asked where her husband was located, and when Sempier told her  
22 that he was asleep in the living room, the victim said, "Oh. Well, scoot closer." *Id.* at 252-53.

23 ///



1 Sempier later testified that he was “100 percent positive that [the victim] saw [him] walk in the  
2 room because she was looking right at [him].” *Id.* at 289.

3 Sempier’s trial counsel testified at the post-conviction evidentiary hearing that he presented  
4 a consent defense, arguing that the victim “had flirted with [Sempier]” and “that the DNA arrived  
5 there in a consensual manner.” ECF No. 34-1 at 41, 70. Sempier’s trial counsel explained that there  
6 was no mistaken belief of consent because Sempier “testified that he was a hundred percent sure  
7 that [the victim] knew who it was, that she looked right at him that morning.” *Id.* at 69, 85. Indeed,  
8 Sempier’s trial counsel testified that he could not “really get [his] head around how” a mistaken  
9 belief of consent defense would work because “mistaken consent would . . . be inconsistent with  
10 th[e] factual basis that [he was] advancing.” *Id.* at 87.

11 A mistaken belief of consent defense could have been presented at Sempier’s trial. *See*  
12 *Carter v. State*, 121 P.3d 592, 956 (Nev. 2005) (“[A] reasonable mistaken belief as to consent is a  
13 defense to a sexual assault charge.”). However, due to Sempier’s own testimony at trial, the  
14 Nevada Supreme Court reasonably concluded that Sempier failed to demonstrate that his trial  
15 counsel was deficient for failing to present this defense. *Strickland*, 466 U.S. at 688.

16 Sempier’s mistaken belief of consent defense is apparently based on the victim’s testimony  
17 that she initially believed that the sexual encounter was with her husband. However, because  
18 Sempier testified that the victim asked him where her husband was located, that the victim looked  
19 right at him, and that he was positive that the victim knew it was him, a mistaken belief of consent  
20 defense was not supported by the evidence and would not have been reasonable. Therefore,  
21 because Sempier’s trial counsel chose to present a consent defense, which was reasonable based  
22 on Sempier’s testimony, it cannot be concluded that Sempier’s trial counsel was deficient. *See*  
23 *Phillips v. Woodford*, 267 F.3d 966, 979 (9th Cir. 2001) (“[D]efense counsel does not have an

obligation to pursue an alternative, conflicting defense once he *reasonably* selects the defense to present at trial.” (emphasis in original)); *see also Tuck v. White*, 116 F.3d 1264 (9th Cir. 1997) (“[O]nce [counsel] reasonably selected the self-defense theory, his duty to investigate the competency defense, which directly conflicted with the self-defense theory, ended.”); *cf. Rios v. Rocha*, 299 F.3d 796, 806 (9th Cir. 2002) (“[A]ny decision to forgo a defense on the basis of unreasonable assumptions is not a reasonable decision or a strategic or tactical decision entitled to deference.”).

Because the Nevada Supreme Court reasonably denied Sempier’s claim that his trial counsel was deficient regarding failing to present an alternative defense, Sempier is denied federal habeas relief for Ground 3.

#### **D. Ground 4**

In Ground 4, Sempier argues that his trial counsel failed to oppose or otherwise address the State’s motion in limine, which sought to preclude the introduction of evidence that the victim had prior convictions for driving under the influence and domestic battery. ECF No. 10 at 9. Sempier argues that his trial counsel should have especially opposed the motion regarding the domestic battery because it epitomized the fact that the victim and her husband were not an emotionally healthy couple. *Id.* at 64.

In affirming the denial of Sempier’s state habeas petition, the Nevada Supreme Court held:

Sempier argues that trial counsel should have opposed the State’s motion in limine to preclude evidence of a domestic-violence incident between the victim and her husband occurring after the sexual assault. [Footnote 1: Sempier also argues that trial counsel should have opposed the State’s motion in limine to preclude evidence of the victim’s prior DUI conviction, but Sempier concedes on appeal that he was not prejudiced by counsel’s inaction and makes no further argument with respect to that claim. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (declining to consider claims not supported by cogent argument).] Sempier fails to demonstrate that counsel’s performance was deficient or that he was prejudiced. At the evidentiary hearing, trial counsel explained that he chose not to oppose the

1 State's motion because he had concerns about the admissibility and relevance of  
2 the physical altercation between the victim and her husband. Sempier fails to  
3 demonstrate that this decision was objectively unreasonable. Therefore, the district  
4 court did not err in denying this claim.

5 ECF No. 37-11 at 6–7. The Nevada Supreme Court's rejection of Sempier's *Strickland* claim was  
6 neither contrary to nor an unreasonable application of clearly established law as determined by the  
7 United States Supreme Court.

8 Prior to trial, the State moved to preclude Sempier "from questioning witnesses regarding  
9 [the] victim's prior criminal conviction [for driving under the influence of alcohol] and subsequent  
10 domestic violence investigation and arrest." ECF No. 25-15 at 2. Later, at a hearing to confirm  
11 Sempier's trial, Sempier's trial counsel informed the state district court that "the motion in limine  
12 pending is not going to be objected to." ECF No. 25-17 at 5. Based on the lack of an objection, the  
13 state district court granted the State's motion. *Id.* at 6.

14 Sempier's trial counsel testified at the post-conviction evidentiary hearing that he was  
15 aware of the victim's DUI conviction and domestic battery arrest. ECF No. 34-1 at 41–42. The  
16 domestic battery "was after the allegation of the sexual assault," and Sempier's trial counsel  
17 believed "it was mutual violence," although the victim's husband "received the worst of it and was  
18 transported for triage by emergency staff resulting in stitches." *Id.* at 43–44. The cause of the  
19 domestic violence incident was the victim being "upset over the way her husband had responded  
20 to her allegation of sexual assault." *Id.* at 45. Sempier's trial counsel explained that he did not  
21 object to the motion because he came to the following agreement with the State: he would not  
22 introduce evidence of the victim's DUI or domestic violence incident if the State did not introduce  
23 evidence of Sempier's prior misdemeanor conviction. *Id.* at 49. Sempier's prior misdemeanor

///

1 conviction was for “outraging public decency” and “involved taking photographs of underage  
2 people involved in sex acts.” *Id.* at 46–47.

3       Regarding his deal with the State, Sempier’s trial counsel explained that he did not think  
4 that the victim’s DUI conviction would have been admissible and thought that there was only  
5 “tenuous” evidentiary value regarding the victim’s domestic battery arrest since “it certainly never  
6 resulted in a conviction for whatever reason,” it was not contemporaneous with the sexual assault  
7 at issue, and it did not involve Sempier. *Id.* at 49–50, 101. Regarding Sempier’s misdemeanor  
8 conviction, Sempier’s trial counsel did not think it would have necessarily been admissible except  
9 “[p]otentially if it was some prior bad act.” *Id.* at 98.

10       The Nevada Supreme Court reasonably determined that Sempier failed to demonstrate  
11 prejudice regarding his trial counsel’s alleged deficiency for not objecting to the State’s motion in  
12 limine. *Strickland*, 466 U.S. at 688. Sempier fails to demonstrate that the victim’s domestic  
13 violence arrest and DUI conviction<sup>4</sup> would have been admissible even if his trial counsel has  
14 opposed the motion in limine. Although the alleged cause of the fight between the victim and her  
15 husband was the victim’s concerns over her husband’s reaction to the sexual assault, the domestic  
16 battery arrest itself was otherwise unrelated to the sexual assault, such that Sempier fails to  
17 demonstrate that the state district court would have found it to be relevant or admissible. *See Nev.*  
18 *Rev. Stat. § 48.015* (“‘[R]elevant evidence’ means evidence having any tendency to make the  
19 existence of any fact that is of consequence to the determination of the action more or less probable  
20 than it would be without the evidence.”); *see also Nev. Rev. Stat. § 50.085(3)* (“Specific instances  
21 of the conduct of a witness, for the purpose of attacking or supporting the witness’s credibility,  
22

---

23 <sup>4</sup> Nevada law provides that “evidence that the witness has been convicted of a crime is admissible  
but only if the crime was punishable by death or imprisonment for more than 1 year under the law  
under which the witness was convicted.” *Nev. Rev. Stat. § 50.095(1)*.

1 other than conviction of crime, may not be proved by extrinsic evidence. They may, however, *if*  
2 *relevant to truthfulness*, be inquired into on cross-examination of the witness.” (Emphasis added)).  
3 Indeed, the Nevada Supreme Court, the final arbiter of Nevada law, concluded that Sempier failed  
4 to demonstrate that his trial counsel’s decision to not oppose the motion due to concerns about  
5 admissibility and relevance under Nevada law was objectively unreasonable. Therefore, because  
6 the Nevada Supreme Court reasonably denied Sempier’s ineffective-assistance-of-trial-counsel  
7 claim, Sempier is denied federal habeas relief for Ground 4.

8 **E. Ground 5**

9 In Ground 5, Sempier argues that the State relied on the victim’s testimony, which it should  
10 have known was false, or, alternatively, his trial counsel failed to address inconsistencies in the  
11 victim’s testimony. ECF No. 10 at 11, 67–68. Sempier notes the following inconsistencies in the  
12 victim’s story: she could not account for how she got into bed on her own, she claims that her leg  
13 was wiped with a tissue but the tissue she presented to law enforcement had no semen on it, she  
14 was inconsistent about where Sempier ejaculated, she testified at the preliminary hearing that there  
15 was no time for Sempier to have gone to the bathroom to have gotten a tissue even though her trial  
16 testimony stated that Sempier retrieved tissue from the bathroom, her testimony that she did not  
17 wake up during the sexual encounter was not feasible in light of her testimony that she was awoken  
18 by Sempier “pulling out,” she was inconsistent in describing the lighting at the time of the  
19 encounter, she was inconsistent about her reaction to the assault, she said she did not believe she  
20 flirted with Sempier even though her actions proved otherwise, and she downplayed her  
21 relationship with Sempier. *Id.* at 68–72.

22 In affirming the denial of Sempier’s state habeas petition, the Nevada Supreme Court held:

23 Sempier argues that trial counsel should have objected to the prosecution’s knowing  
use of false testimony and should have addressed the inconsistencies in that

1 testimony. Sempier fails to demonstrate that counsel's performance was deficient  
2 or that he was prejudiced. His claim regarding the prosecution's knowing use of  
3 false testimony is based on an assumption that the victim was lying. Sempier fails  
4 to demonstrate that the victim provided false testimony, and thus fails to  
5 demonstrate that counsel was ineffective for failing to make this argument.  
6 Furthermore, counsel cross-examined the victim about numerous inconsistencies in  
7 her testimony, and Sempier fails to show that counsel's failure to inquire about  
8 other inconsistencies was objectively unreasonable or that there was a reasonable  
9 probability of a different outcome had counsel made such inquiries at trial.  
10 Therefore, the district court did not err in denying this claim.

11 ECF No. 37-11 at 8. The Nevada Supreme Court's rejection of Sempier's claim was neither  
12 contrary to nor an unreasonable application of clearly established law as determined by the United  
13 States Supreme Court.

14 "[A] conviction obtained through use of false evidence, known to be such by  
15 representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois*, 360  
16 U.S. 264, 269 (1959). This rule applies "when the State, although not soliciting false evidence,  
17 allows it to go uncorrected when it appears" and when "the false testimony goes only to the  
18 credibility of the witness." *Id.* A *Napue* violation claim will succeed when "(1) the testimony (or  
19 evidence) was actually false, (2) the prosecution knew or should have known that the testimony  
20 was actually false, and (3) the false testimony was material." *Hayes v. Brown*, 399 F.3d 972, 984  
(9th Cir. 2005) (internal quotation marks and alternation omitted). "[A] conviction obtained by the  
21 knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any  
22 reasonable likelihood that the false testimony could have affected the judgment of the jury." *United*  
23 *States v. Agurs*, 427 U.S. 97, 103 (1976).

24 As the Nevada Supreme Court reasonably noted, Sempier's false testimony claim is based  
25 on his argument that the victim was lying about the sexual assault. Although inconsistencies in the  
26 victim's testimony may affect her credibility, they do not demonstrate that she lied about the sexual

1 assault. Instead, the jury, as the factfinder, was called to determine who it believed was telling the  
2 truth: the victim or Sempier. Accordingly, it is not clear that the State presented evidence that was  
3 “actually false.” *Hayes*, 399 F.3d at 984.

4       This Court now turns to Sempier’s argument that his trial counsel failed to address  
5 inconsistencies in the victim’s testimony. During cross-examination, the victim testified that she  
6 closed her bedroom door behind her when she went to bed on August 25, 2011. ECF No. 26-1 at  
7 99. Sempier’s trial counsel asked the victim to review her preliminary hearing testimony, at which  
8 point the victim explained that “[a]t that time I responded that I don’t remember.” *Id.* Sempier’s  
9 trial counsel then asked the victim whether the light was on in her bedroom when she went to bed,  
10 and the victim responded in the negative. *Id.* at 101. However, after having the victim again review  
11 her preliminary hearing transcript, the victim admitted that she previously testified that the light  
12 was on. *Id.* at 102. Next, after the victim testified that she went to sleep on the floor, Sempier’s  
13 trial counsel asked how she got into bed, and the victim testified that she did not remember. *Id.* at  
14 106. Further, the victim testified that she felt “the tissue wiping [her] leg off” a “couple seconds  
15 after the penetration” ended. *Id.* at 111. Sempier trial counsel then clarified, “wasn’t it your  
16 testimony earlier today that you heard toilet paper rattling in the bathroom” before feeling the  
17 tissue paper. *Id.* at 112. The victim responded in the affirmative and explained that she heard the  
18 toilet paper “right before the tissue was wiping off my leg.” *Id.* Finally, as noted in Ground 1(e),  
19 Sempier’s trial counsel asked the victim about her interactions with Sempier the night before the  
20 sexual assault, implying that she was flirting with him. *See* ECF No. 26-1 at 95–97 (getting the  
21 victim to admit that she chatted with Sempier, compared games with him on their cellular  
22 telephones while sitting closely together, showed him some of her sketches, and asked him to sing  
23 with her in the bathroom).

1 It is true that Sempier's trial counsel did not bring forth all of the alleged inconsistencies  
2 in the victim's previous accounts of the sexual assault, as detailed by Sempier. However, the  
3 Nevada Supreme Court reasonably determined that Sempier failed to demonstrate prejudice.  
4 *Strickland*, 466 U.S. at 694. As noted, Sempier's trial counsel went through a number of  
5 inconsistencies in the victim's testimony, such that the Nevada Supreme Court reasonably  
6 determined that Sempier fails to demonstrate that pointing out further inconsistencies would have  
7 rendered a different verdict, especially since none of the remaining alleged inconsistencies were  
8 especially consequential in casting doubt on the remainder of the victim's testimony. *See Doe v.*  
9 *Ayers*, 782 F.3d 425, 431 (9th Cir. 2015) (concluding that the defendant's trial counsel "could have  
10 done a much better job of impeaching [the witness], . . . but the failures regarding impeachment of  
11 [the witness] are of comparatively little consequence").

12 Because the Nevada Supreme Court reasonably denied Sempier's false evidence and  
13 ineffective-assistance-of-trial-counsel claims, Sempier is denied federal habeas relief for Ground  
14 5.

#### 15 **F. Ground 6**

16 In Ground 6, Sempier argues that there was cumulative error regarding his trial counsel's  
17 ineffectiveness. ECF No. 10 at 13. In affirming the denial of Sempier's state habeas petition, the  
18 Nevada Supreme Court held: "Even assuming that multiple deficiencies in counsel's performance  
19 may be cumulated to establish prejudice, *see McConnell v. State*, 125 Nev. 243, 259, 212 P.3d  
20 307, 318 (2009), Sempier has not demonstrated any deficient performance, and thus there is  
21 nothing to cumulate." ECF No. 37-11 at 9. This ruling was reasonable.

22 Cumulative error applies where, "although no single trial error examined in isolation is  
23 sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still



1 prejudice a defendant.” *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996); *see also*  
 2 *Parle v. Runnels*, 387 F.3d 1030, 1045 (9th Cir. 2004) (explaining that the court must assess  
 3 whether the aggregated errors “so infected the trial with unfairness as to make the resulting  
 4 conviction a denial of due process” (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974))).  
 5 This Court has not identified any definite errors on the part of Sempier’s trial counsel, so there are  
 6 no errors to cumulate. Sempier is denied federal habeas relief for Ground 6.

#### 7 **G. Ground 7**

8 In Ground 7, Sempier argues that his appellate counsel filed an ineffective appeal. ECF  
 9 No. 10 at 15, 77. Sempier elaborates that his trial counsel, who became his appellate counsel, failed  
 10 to object to several issues, thereby failing to preserve those issues on appeal. *Id.* at 78. For example,  
 11 Sempier alleges that his trial counsel failed to object when Sempier was called a predator, when  
 12 the testimony of the nurse was misstated, and to the motion in limine. *Id.* at 78-79.

13 In affirming the denial of Sempier’s state habeas petition, the Nevada Supreme Court held:

14 Sempier argues that trial counsel was ineffective for failing to preserve errors for  
 15 appeal and for raising a non-meritorious claim on direct appeal. Sempier does not  
 16 provide specific argument as to any errors that were not preserved, but instead relies  
 17 on the claims of ineffective assistance addressed previously. He fails to demonstrate  
 18 that counsel was deficient on appeal or that he was prejudiced by counsel’s  
 performance. *See Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996)  
 (applying the *Strickland* standard to claims of ineffective assistance of appellate  
 counsel). Therefore, the district court did not err in denying this claim.

19 ECF No. 37-11 at 8-9. The Nevada Supreme Court’s rejection of Sempier’s *Strickland* claim was  
 20 neither contrary to nor an unreasonable application of clearly established law as determined by the  
 21 United States Supreme Court.

22 At Sempier’s post-conviction evidentiary hearing, Sempier’s trial counsel testified that he  
 23 “may have” looked at other issues to raise on appeal, but he “didn’t perceive any . . . error”

1 regarding evidentiary rulings. ECF No. 34-1 at 72. Sempier's trial counsel was "cognizant of the  
2 fact that to preserve an appellate record, [he] would have to make a good trial record." *Id.* at 73.  
3 However, regarding an appeal, Sempier's trial counsel explained that he was "not of the opinion  
4 to throw everything in." *Id.* at 90-91.

5         Sempier only alleges three specific instances where his trial counsel failed to object and  
6 failed to include the issue on appeal: when the State called Sempier a predator, when the State  
7 misstated the testimony of Robison during closing argument, and when the State filed its motion  
8 in limine. Because the second and third instances were brought forth in Sempier's state habeas  
9 proceedings and were denied by the Nevada Supreme Court, Sempier fails to demonstrate that the  
10 Nevada Supreme Court would have granted Sempier's direct appeal had these issues instead been  
11 included there and reviewed under a harmless error standard. *See Nev. Rev. Stat. § 178.598*  
12 (explaining that if a defendant objected to a potential error at trial, the appellate court reviews for  
13 harmless error: "[a]ny error, defect, irregularity or variance which does not affect substantial rights  
14 shall be disregarded"). Lastly, it was not objectionable for the State to characterize Sempier as a  
15 "predator." "[T]he law permits the prosecution considerable latitude to strike 'hard blows' based  
16 on the evidence and all reasonable inferences therefrom." *United States v. Rude*, 88 F.3d 1538,  
17 1548 (9th Cir. 1996) (finding government's conduct acceptable after it referred to the defendants  
18 "as 'crooks' or 'evil' at least eleven times; used terms or phrases such as 'con man,' 'charlatans,'  
19 'trolling around for victims,' 'lie,' 'lies,' or 'lied' over 90 times; and also used words such as  
20 'Ponzi Scheme,' 'practicing their craft,' 'perfecting their craft,' and 'victim'"). Accordingly, the  
21 Nevada Supreme Court reasonably denied Sempier's ineffective-assistance-of-trial-counsel and  
22 ineffective-assistance-of-appellate-counsel claim. *Strickland*, 466 U.S. at 688, 694; *Smith v.*  
23 *Robbins*, 528 U.S. 259, 285 (2000) (explaining that the *Strickland* standard is also utilized to

1 review appellate counsel's actions: a petitioner must show "that [appellate] counsel unreasonably  
2 failed to discover nonfrivolous issues and to file a merits brief raising them" and then "that, but  
3 for his [appellate] counsel's unreasonable failure to file a merits brief, [petitioner] would have  
4 prevailed on his appeal"). Sempier is denied federal habeas relief for Ground 7.

#### 5 **IV. CERTIFICATE OF APPEALABILITY**

6 This is a final order adverse to Sempier. As such, Rule 11 of the Rules Governing Section  
7 2254 Cases requires this Court issue or deny a certificate of appealability (COA). Therefore, this  
8 Court has *sua sponte* evaluated the claims within the petition for suitability for the issuance of a  
9 COA. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002). Pursuant  
10 to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial  
11 showing of the denial of a constitutional right." With respect to claims rejected on the merits, a  
12 petitioner "must demonstrate that reasonable jurists would find the district court's assessment of  
13 the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing  
14 *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue  
15 only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of  
16 a constitutional right and (2) whether the court's procedural ruling was correct. *Id.* Applying these  
17 standards, this Court finds that a certificate of appealability is warranted for the claim that  
18 Sempier's trial counsel was ineffective for failing to employ an expert and for the claim that  
19 Sempier's trial counsel was ineffective for failing to adequately impeach the victim.

#### 20 **V. CONCLUSION**

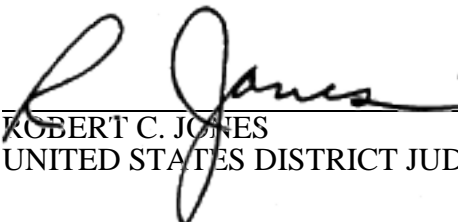
21 IT IS THEREFORE ORDERED that the Petition for a Writ of Habeas Corpus Pursuant to  
22 28 U.S.C. § 2254 by a Person in State Custody (ECF No. 10) is DENIED.

23 ///

1 IT IS FURTHER ORDERED that Petitioner is granted a certificate of appealability for the  
2 claim that Petitioner's trial counsel was ineffective for failing to employ an expert and for the  
3 claim that Petitioner's trial counsel was ineffective for failing to adequately impeach the victim.

4 IT IS FURTHER ORDERED that the Clerk of the Court is directed to enter judgment  
5 accordingly.

6 Dated: November 12, 2020.

7   
8 ROBERT C. JONES  
9 UNITED STATES DISTRICT JUDGE  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23